IN THE

Supreme Court of the United States

October Term, 1977
No. 77-982

LETTIE LINDA TASSELLI and VITO M. TASSELLI, dba GOLDEN GARTER,

Appellants,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Appellees.

On Appeal From the Court of Appeal of the State of California.

MOTION TO DISMISS.

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APPELLEES DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA move to dismiss the instant appeal on the following grounds:

1. Appellants have failed to raise a substantial federal question; and

2. The issues raised by appellants have been expressly decided by this court.

Questions Raised.

1. Has the decision in *California v. LaRue* (1972) 409 U.S. 109 [34 L.Ed. 2d 342, 93 S.Ct. 390] retained validity after *Craig v. Boren* (1976) 429 U.S. 190 [50 L.Ed. 2d 397, 97 S.Ct. 451]?

2. May a state forbid holders of on-sale alcoholic beverage licenses from presenting nude but not necessarily obscene dancing on licensed premises?

Statement of the Case.

On November 4, 1975, an Accusation was filed by appellee Department of Alcoholic Beverage Control whereby appellants were accused of 22 counts of permitting employees to display breasts, buttocks, pubic hair and/or vulvas on a stage that was not at least six feet removed from the nearest patron. Said acts occurred on July 2, 31, September 13, and October 8, 1975, and were alleged to be in violation of Business and Professions Code section 24200(a)[1] and Article XX, section 22 of the California State Constitution as to all counts. Title IV of the California Administrative Code, Rule 143.3(1)(c) was additionally alleged to be violated as to counts II, IV, VI, VIII, X, XII,

[1]Business and Professions Code section 24200(a) provides:

§ 24200. Grounds for suspension or revocation

The following are the grounds which constitute a basis for the suspension or revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the California Constitution.

XIV, XVI, XVIII, XX and XXII. Violations of Title IV of the California Administrative Code, Rule 143.3(2) were additionally alleged as to counts I, III, V, VII, IX, XIII, XV, XVII, XIX, and XXI.[2]

The Accusation further alleged that a disciplinary action dated April 17, 1975 was pending hearing for violations of the identical constitutional provision, statutes and rules.

[2]Title IV, California Administrative Code, Rule 143.3 provides:

143.3. Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

After a hearing upon the matters alleged in the Accusation, the administrative law judge determined that appellants violated Article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code as to each count; and that appellants violated section 24200(a) and (b) of said code by permitting violations of Title IV, California Administrative Code, Rule 143.3(1)(c) as to counts II, IV, VI, VIII, X, XII, XIV, XVI, XVIII, XX, XXII and Rule 143.3(2) as to counts I, III, V, VII, IX, XI, XIII, XV, XVII, XIX and XXI.

The administrative law judge's proposed decision recommended that appellants' license be suspended for a period of 30 days on each count, such suspensions as to counts I through XIV to run concurrently; as to counts XV through XXII concurrently with each other and consecutively as to counts I through XIV. The suspensions for counts XV through XXII were stayed for one year on condition that no cause for disciplinary action should arise during that time.

On or about August 19, 1976, appellee Department of Alcoholic Beverage Control adopted the administrative law judge's proposed decision and recommendation. On or about September 24, 1976, appellants filed a Notice of Appeal from the decision of appellee Department of Alcoholic Beverage Control to appellee Alcoholic Beverage Control Appeals Board.

The Alcoholic Beverage Control Appeals Board, upon receipt of written and oral argument, took the matter under submission on July 27, 1977. On or about September 7, 1977, appellee Alcoholic Beverage Control Appeals Board filed its opinion affirming the Order

of Suspension of appellee Department of Alcoholic Beverage Control.

Appellants filed a Petition for Writ of Review and for Stay Order in the Court of Appeal of the State of California, Second Appellate District. On October 12, 1977, the petition was denied without opinion.

Appellants filed a Petition for Hearing and for Stay Order in the Supreme Court of the State of California. On November 10, 1977, a hearing was denied.

On November 21, 1977, appellee Department of Alcoholic Beverage Control issued a Notice advising appellants that appellee Department would call on or after December 1, 1977 to pick up the license certificate, inasmuch as appellants' appeals were now final.

Statement of the Facts.

Phillip Ray Henry, Senior Special Investigator for appellee Department of Alcoholic Beverage Control, went to the licensed premises on July 2, 1975, accompanied by Investigator Pearson. Investigator Henry arrived a little before 6 p.m. and initially located himself at the east end of a bar fixture within the premises.

Upon entering the premises, Investigator Henry observed an unidentified female attired in a bikini outfit just completing a dance routine to a song. Another dancer known as Dorothy Horton then entered the stage area and danced to four songs. She was initially attired in a two-piece bikini, green in color, with the lower portion of the bikini designed to appear as a dollar bill. After completing the first song, she removed the top of the bikini and danced to a second song while topless.

Dorothy Horton danced to a third and fourth song completely nude, exposing her breasts, pubic hair, vaginal lips and anus within approximately four feet from the nearest patron. At points of her performance she would stand with her back to a particular group of patrons with her legs slightly apart and bend forward at the waist, thereby exposing her anus and vaginal lips to the patrons seated behind her.

After Dorothy Horton's performance, an unidentified female danced to a four song routine. Again the first dance performed was performed in a bikini, the second one topless, and the third and fourth dances completely nude, thereby exposing her breasts, buttocks and pubic hair. This dancer came between three and six feet of the closest patron.

Norman Allen Pearson, Special Investigator with appellee Department of Alcoholic Beverage Control, went to the licensed premises on July 31, 1975, arriving at about 6:15 p.m. Investigator Pearson was accompanied by his partner, Investigator T. C. Lee. Investigator Pearson observed Linda Brown enter the stage. She danced four numbers: the first one wearing a bikini outfit, the second topless, and the third and fourth dances totally nude, thereby exposing her breasts, buttocks, pubic hair, vaginal lips and her anus. Ms. Brown danced within four to six feet of the nearest patron.

Investigator Pearson next observed Theda A. Simpson and Helene F. Statham get up on the stage. Ms. Simpson was wearing a net-type bikini outfit and Ms. Staham was wearing a floor length dress. Both performers danced topless, then bottomless, exposing their breasts, buttocks, pubic hair, vaginal lips and anuses to the

patrons. The nearest patron was within a three to six foot distance from the dancers.

The last dancer observed by Investigator Pearson was Ms. Young, who took the stage after Ms. Statham and Ms. Simpson. Ms. Young danced the first dance clothed in a black bikini, the second dance topless, the third dance totally nude, thereby exposing her breasts, buttocks, pubic hair, vaginal lips and anus. Ms. Young would walk to the edge of the stage, approximately a three to six foot distance from the nearest patron, turn her back, bend forward and expose her buttocks and anus to the patrons. Ms. Young then would reach her hands between her spread legs and pat the cheeks of her buttocks with the back of her hands several times.

Investigator Pearson observed patrons putting money on the edge of the stage during the dancing. The girls would pick up the money when they finished their routine.

Marvin R. Thomas, Special Investigator for appellee Department of Alcoholic Beverage Control, went to the licensed premises on September 13, 1975. Investigator Thomas was accompanied by Norman Pearson and Troy Lee. They entered the premises at about 8:45 p.m.

Investigator Thomas observed Sandra M. Frybarger dance to the music of four records. The first dance Ms. Frybarger was dressed in a pink bikini, a second dance was topless, and the third and fourth dances were completely nude. Investigator Thomas could see Ms. Frybarger's breasts, buttocks, and her pubic hair. Ms. Frybarger danced within three to four feet of the nearest patron.

Amyrlis A. Barrett was the next dancer. Ms. Barrett danced to the music of four records, starting her performance dressed in a floral print bikini. The second dance was topless, and the third and fourth dances were completely nude, thereby exposing her breasts, buttocks and pubic area within three to four feet of the patrons.

Ronda Dunlap followed Ms. Barrett. Ms. Dunlap started her performance wearing a red knit bikini. On the second record she took off her bra and on the third and fourth records she took off her bottom to dance completely nude, exposing her breasts, pubic hair and buttocks. Ms. Dunlap came within three to four feet of the nearest patron.

Leonard Collen, District Administrator with appellee Department of Alcoholic Beverage Control, went to the licensed premises on October 8, 1975, arriving at 4:30 p.m. Mr. Collen was seated at a stage table, right in front of the stage where there was a young lady dancing in a bikini. Coincidentally with Mr. Collen's being served a drink, the dancer took off her bra and continued to dance for perhaps seven minutes. Six other patrons were seated around the stage. The dancer then took off her bikini bottom and danced to another record nude. She did some small leg kicks and bent down close to some of the customers seated around the bar. Her buttocks were exposed as well as her pubic hair and vulva. She came as close as three feet to the nearest patron. This dancer was subsequently identified as Sandy.

Defense.

Appellant, Vito M. Tasselli, acquired an on-sale general license on October 20, 1971. Prior to that time he held a beer license since 1967 at the same location. No formal accusations were filed agianst his beer license.

The Golden Garter is licensed by the City of Compton. It holds a business license as well as an entertainment license, the latter since 1973. The entertainment license licenses the Golden Garter to present nude entertainment. Nude entertainment has been presented since April 1975. Two arrests have been made in the premises for the dances, both cases having been dismissed. An arrest not related to the dancers was made previously, in 1968. The Golden Garter is a nightclub with nude entertainment and serves food. It is open at 4 p.m. The clientele are working and middle class people. No problems as far as fights or arrests exist.

Wilson Buckner, City of Compton city councilman, brought visitors to the Golden Garter from Compton's sister city in Mexico in 1975 and 1976 to celebrate Cinco de Mayo.

To Mr. Tasselli's knowledge, no complaints or protests from citizens or residents of Compton regarding the offering of nude entertainment at the Golden Garter have been made.

ARGUMENT.

I

Appellee Department's Rule 143.3 Is Constitutional.

Appellee Department of Alcoholic Beverage Control is an administrative agency vested by the California Constitution with authority for licensing sales of alcoholic beverages and authority to suspend or revoke any license when its continuation would be contrary to public welfare or morals. Art. XX, § 22, Cal. Const.

In *California v. LaRue* (1972) 409 U.S. 109, this court upheld the First Amendment facial constitutionality of appellee Department's action in prohibiting nude, but not necessarily obscene, performances in conjunction with an on-sale liquor license. Appellants' instant constitutional challenge to Rule 143.3 was specifically considered and rejected in *LaRue:*

> " 'The substance of the regulations . . . prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.
>
> '. . . But we would poorly serve both the interests for which the State may validly seek

> vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.
>
> 'The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.' " *LaRue, supra,* at pp. 117-18.

The *LaRue* construction of the Twenty-first Amendment in the area of liquor sales regulations was subsequently affirmed in *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922; see also *City of Kenosha v. Bruno* (1973) 412 U.S. 507, 515. The court stated in *Doran:*

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118 (1972) that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. *In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor conferred by the Twenty-first Amendment outweighed any First Amendment interest in nude dancing and that a State could*

therefore ban such dancing as a part of its liquor license program." (Emphasis added.) 422 U.S. 922, 932-33.

Craig v. Boren (1976) 429 U.S. 190, cited by appellants, does not challenge *LaRue's* reliance upon the Twenty-first Amendment to strengthen the State's authority to regulate live entertainment at establishments licensed to dispense liquor. *Craig* distinguished *LaRue* on the basis that no First Amendment issues were involved where the State had lowered the liquor purchasing age requirement for women:

> "It is true that California v. LaRue, 409 U.S. 109, 115 (1972), relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication,' *id.*, at 118. Nevertheless the Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. Rather, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-179 (1972), establishes that state liquor regulatory schemes cannot work invidious discriminations that violate the Equal Protection Clause." *Id.*, at 207-08.

Appellants' reliance upon *Craig* is therefore misplaced. *Craig* held that the Twenty-first Amendment did not save gender-based discrimination in the sale of liquor from invalidation as a denial of equal protection violative of the Fourteenth Amendment. 429 U.S.

190, 207. The statutes constitutionally voided in *Craig* contained no restrictions on activities protected by the First Amendment. The strength lent by the Twenty-first Amendment to appellee Department's Rule 143.3 under *LaRue* therefore remains undisturbed.

The effect of *Craig* upon *LaRue* was considered by the Court of Appeals for the Ninth Circuit in *Richter v. Dept. of Alcoholic Beverage Control* (9th Cir. 1977) 559 F.2d 1163, 1171. The Court of Appeals concluded that both *LaRue* and appellee Department's Rule 143.3 retained their validity. 559 F.2d 1168, 1172.

Appellants' contention that Rule 143.3(1)(c) is unconstitutional as applied is not demonstrated either in appellants' Jurisdictional Statement or by the particular type of nude dancing reflected in the administrative record and summarized above. That dancing clearly partakes more of gross sexuality than communicative expression; however, this issue need not be reached. Nude dancing of the type performed in appellants' establishment is not the subject of the Rule 143.3 prohibition; rather, it is the sale of alcoholic beverages. *LaRue, supra,* at 118; *Richter, supra,* at 1172. The constitutional quality of appellants' dancing is irrelevant granted appellee Department's power to constitutionally prohibit the serving of liquor in establishments which provide nude dancing.

Conclusion.

The issues raised by appellants have been expressly decided by this court and by the Court of Appeals for the Ninth Circuit. No substantial federal questions remain for this court's consideration. The instant appeal should therefore be dismissed.

Respectfully submitted,

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